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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
Closed Captioning and Video Description)	MM Docket No. 95-176
of Video Programming)	
)	
Implementation of Section 305 of the)	
Telecommunications Act of 1996)	
)	
Video Programming Accessibility)	

To the Commission:

COMMENTS OF COX ENTERPRISES, INC.

COX ENTERPRISES, INC.

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TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY	1
I. THE TELECOMMUNICATIONS ACT GRANTS THE COMMISSION JURISDICTION OVER PROGRAM PROVIDERS TO ENFORCE CLOSED CAPTIONING REQUIREMENTS.	3
II. RESPONSIBILITY FOR COMPLIANCE WITH CLOSED CAPTIONING REQUIREMENTS SHOULD BE PLACED ON THE PARTIES CAPABLE OF COMPLYING MOST EFFICIENTLY AND EFFECTIVELY — PROGRAM PRODUCERS.	5
CONCLUSION	11

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To the Commission:

COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox") hereby submits its comments on the *Notice of Proposed Rulemaking* (the "*Notice*") in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The *Notice* represents the Commission's first attempt to implement the video programming accessibility provisions of the Telecommunications Act of 1996 (the "1996 Act").^{1/} In adopting those provisions, Congress was concerned that video programmers are not adequately making video programming accessible to viewers with hearing disabilities. Consequently, Congress established a requirement that all new video programming be captioned unless specifically exempted by the Commission and that programmers "maximize" the accessibility of pre-existing or "library" programming.

^{1/} Pub. L. No. 104-104, 110 Stat. 56 (1996).

The Congressional mandate to make video programming more accessible to the hearing-impaired is a worthy goal. If the Commission's current compliance proposals are adopted, however, the burden of making video programming more accessible, as a practical matter, would fall upon those entities least able to ensure that the Commission's goals will be achieved.

In responding to the *Notice*, Cox draws from its perspective as the operator of multiple cable systems, the licensee of seven television broadcast stations, and the part-owner of several major program services and a major distribution and program production company. The Commission will best advance the interests of viewers with hearing disabilities if it holds program *producers* rather than program *providers* accountable for compliance with its closed captioning rules. There is no disagreement that captioning is most efficiently accomplished at the production stage. Program producers are better able to monitor and ensure compliance with the Commission's captioning requirements than cable operators or television stations. Congress accorded the Commission the authority to hold program producers accountable for closed captioning of their programming, and the Commission should implement Congress' mandate by placing the responsibility for captioning where it will do the most good.

I. THE TELECOMMUNICATIONS ACT GRANTS THE COMMISSION JURISDICTION OVER PROGRAM PROVIDERS TO ENFORCE CLOSED CAPTIONING REQUIREMENTS.

Congress recognized that captioning occurs most efficiently at the production stage.

Congress accordingly gave the Commission jurisdiction over program producers with respect to enforcement of the Commission's closed captioning requirements.

The Commission's authority over program producers — including video programming networks and syndicators or distributors of video programming — is apparent in both the 1996 Act and its legislative history. The closed captioning provisions in the 1996 Act refer to "video programming providers *or owners*" when discussing closed captioning obligations or the ability to seek waivers of those obligations.^{2/} For example, Section 713(b)(2) of the Communications Act of 1934, as amended, (the "Act") obligates "video programming providers or owners" to maximize the accessibility of library programming through the use of closed captions.^{3/} Section 713(d)(1) of the Act instructs the Commission to exempt certain classes of programming or programming providers from the captioning requirements if compliance would be economically burdensome to "the provider or owner of such programming."^{4/} The Act also explicitly refers to both "program providers" and "program owners" in its provisions regarding the exemption from

^{2/} Cox is a program owner as well as a distributor of video programming to the public. Cox holds substantial investments in The Discovery Channel, The Learning Channel, the Outdoor Life Network and the Speedvision Network, as well as interests in several other cable program networks. Cox also operates Rysher Entertainment, which is a production and distribution and syndication company for television and films. If the Commission shifts the responsibility for captioning to program producers, Cox would remain responsible for ensuring that all of its program services are properly captioned.

^{3/} 47 U.S.C. § 613(b)(2).

^{4/} 47 U.S.C. § 613(d)(1).

captioning requirements for pre-existing and inconsistent contracts,^{5/} case-by-case exemptions from captioning requirements under the "undue burden" standard,^{6/} and the parties eligible for petitioning for exemptions under the undue burden standard.^{7/}

The legislative history of the 1996 Act clarifies that Congress intended the term "program provider" to encompass video programming services and other *producers* of video programming. The House Report to the 1996 Act defines the term "provider," as used in the closed captioning provisions, as encompassing "the specific television station, cable operator, *cable network*, or *other service that provides programming to the public*."^{8/} The House Report also instructs the Commission not to impose schedules for the captioning of programming that "would be economically burdensome on program providers, *distributors or the owners* of such programming."^{9/} These statements indicate that Congress intended the Commission to have jurisdiction over producers and syndicators of video programming so that it could place ultimate responsibility for captioning on the parties capable of complying most efficiently and effectively. As discussed below, the imposition of captioning obligations on the owners (i.e. producers) of programming will ensure that the responsibility to caption will be placed on those in the best position to ensure that the Commission's captioning goals are realized and its rules implemented.

^{5/} 47 U.S.C. § 613(d)(2).

^{6/} 47 U.S.C. § 613(e).

^{7/} 47 U.S.C. § 613(d)(3).

^{8/} H.R. Report 104-204, 104th Cong., 1st Sess. ("House Report") (1995) at 114 (emphasis added).

^{9/} *Id.* (emphasis added).

II. RESPONSIBILITY FOR COMPLIANCE WITH CLOSED CAPTIONING REQUIREMENTS SHOULD BE PLACED ON THE PARTIES CAPABLE OF COMPLYING MOST EFFICIENTLY AND EFFECTIVELY — PROGRAM PRODUCERS.

Congress directed the Commission to ensure that its implementation of the closed captioning rules would "not be economically burdensome on" program providers and distributors.^{10/} The Commission can reduce the economic burden of captioning by assigning responsibility for captioning to the entities capable of discharging that responsibility most efficiently rather than those least able to comply with the statute.

The Commission recognizes, "from a practical standpoint, that captioning is most efficient at the production stage."^{11/} As the Commission observes in the *Notice*, placing responsibility for captioning on program producers also comports with the legislative intent of the captioning provisions. The House Report explains that "[i]t is clearly more efficient and economical to caption programming at the time of production and to distribute it with captions than to have each delivery system or local broadcaster caption the program."^{12/} Despite this clear evidence of Congressional intent as to how closed captioning can most efficiently be implemented, the Commission proposes to pursue the *least efficient* course and place responsibility for compliance with the captioning requirements on individual television stations and cable systems.

The Commission apparently has been swayed by the analogies some parties have made to the telecommunications relay service ("TRS") in which the responsibility for providing service is

^{10/} *Id.*

^{11/} *Notice*, ¶ 6.

^{12/} House Report at 114.

placed on the carriers.^{13/} Broadcasters and cable operators are not common carriers, and the Commission should not impose on them a regulatory scheme suited for common carriers. Placing responsibility for captioning on distribution outlets would unnecessarily complicate the captioning process and would hold accountable those entities least culpable for captioning violations and least able to monitor and enforce compliance with the captioning rules.

In proposing to place responsibility for captioning on the systems used to deliver video programming to the public, the Commission apparently assumes that cable operators and television stations can effectively (1) monitor captioning levels in programming they carry; and (2) enforce captioning requirements against those parties providing them with programming. Both of these assumptions are unwarranted. Broadcasters would face a tremendous burden in monitoring the captioning levels in programming with which they are supplied. They undoubtedly would have to hire additional staff to prescreen every program they air. Many television stations broadcast for twenty-four hours a day, so the burdens of prescreening would be overwhelming and never-ending. In addition, some programs are broadcast live or are rebroadcast from a live satellite feed, making prescreening impossible. In such cases, television stations would have no way of knowing whether the material they are retransmitting complies with the Commission's captioning requirements.

The tremendous obstacles to monitoring compliance with the captioning requirements increase exponentially in the multichannel environment of cable systems. As of 1995, 79.4% of

^{13/} See Notice, ¶ 27.

cable systems had at least 30 channels of capacity.^{14/} Nearly *half* of all cable subscribers subscribe to "high-capacity" cable systems, systems with 54 or more channels.^{15/} Those numbers have undoubtedly increased since 1995 and will continue to increase as cable operators roll-out digital systems. Indeed, the multichannel marketplace is rapidly evolving toward an environment in which channel capacity is measured in the *hundreds* of channels. Cox's highly clustered and upgraded systems will be offering hundreds of channels of video programming in the foreseeable future. The *Notice* fails to explain how multichannel video programming distributors ("MVPDs") can be expected to monitor the levels of captioning on hundreds of channels of programming.

The *Notice* further complicates the monitoring problems faced by MVPDs by forcing them to meet certain transitional benchmarks of captioned programming on a *system-wide* basis.^{16/} The Commission suggests that this proposal would give cable operators greater flexibility in meeting their captioning responsibilities. Instead, this proposal represents a logistical nightmare for cable operators. The *Notice* suggests that operators could meet the first benchmark of 25% captioning of new programming simply by carrying one completely captioned channel and three non-captioned channels.^{17/} The operator's task will be complicated

^{14/} *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report*, FCC 96-496, ¶ 16 (rel. Jan. 2, 1997).

^{15/} *Id.*, ¶ 17.

^{16/} *Notice*, ¶ 43.

^{17/} In addition to numerous other problems, this proposal would unduly interfere with a cable operator's editorial discretion to choose the program services it carries. Under the system-wide averaging proposal, operators would be forced to select programming based on a consideration (the percentage of captioning it contains) that is independent of more important

(continued...)

by the fact that few channels are likely to be completely captioned or completely devoid of captioning. Furthermore, these percentages apply only to *new, non-exempt* programming. Therefore, the operator will have no practical way of determining exactly what percentage of a channel's programming is captioned if the channel carries an intermittent mixture of library or exempt programming.

Because the operator will not have the time or the resources to prescreen hundreds of programs and calculate the levels at which each service captions new, non-exempt programming, the operator will be forced to rely on each programming service's *representations* as to its level of captioning. The insurmountable problems that operators will have in monitoring captioning levels on a system-wide basis further justify placing the responsibility for captioning on each individual program service as Congress clearly intended.

The Commission's proposed compliance obligation is precisely backward from what it should be: rather than requiring compliance from the producer, who is in the best — if not the only — position to implement closed captioning on the individual program or programs originated by that producer, the compliance obligation is imposed on a provider of programs, who is confronted with an impossible task of monitoring thousands of such programs. The Commission should divide a large monitoring and enforcement problem into several parts and apportion each program producer individual responsibility for its own programming rather than making a large enforcement problem larger by imposing compliance obligations on program providers.

17/ (...continued)
considerations, such as the quality of the programming, the diversity it adds to the cable system, or the desire for the programming by the system's subscribers.

Not only would cable operators and television stations have overwhelming difficulties in *monitoring* the compliance of the programming they carry, they would also have little means to *enforce* compliance by programmers whose captioning does not satisfy the Commission's standards. The Commission envisions cable operators and television stations passing responsibility for captioning through to programmers as contractual obligations for the delivery of programming. This vision of the marketplace is unrealistic.

Even if a cable operator can force some programmers to agree to indemnify the operator for captioning violations, the operator as a practical matter would not have adequate remedies against a programmer who fails to meet its captioning obligations. Some start-up programmers lack the financial resources necessary to compensate cable operators for any forfeitures imposed because of captioning violations.^{18/} As the party ultimately responsible for compliance with the captioning requirements, a cable operator confronted with a non-compliant programmer would face two equally unpalatable alternatives: (1) to remove the programmer's service from the cable system, which would disserve the system's subscribers; or (2) to attempt to enforce contractual obligations relating to captioning compliance. But this would result in delay and ultimately in litigation. In this situation, moreover, the Commission would be transferring the burden to regulate and enforce the captioning standards to operators who, as has been shown, in a 24-hour, several-hundred-channel environment, have neither the capacity nor the information to conclude whether compliance has occurred.

^{18/} This is particularly true when the programmer is widely-carried and a single captioning violation would place hundreds or thousands of MVPDs in violation of the Commission's rules. *See*, p. 10, *infra*.

Moreover, under the Commission's scheme a programmer's failure to caption properly could expose the operator to *non-financial* penalties for which the operator could not recover from the programmer. Many cable franchises have provisions requiring compliance with Commission rules and regulations. A franchising authority could raise the issue of an operator's noncompliance with the closed captioning rules when the operator seeks to renew its franchise, even though the true "fault" for the violation lies with the programmer who failed to caption its programming properly. Clearly, no contractual provision could possibly compensate an owner for the loss of goodwill and potential difficulties in renewing a franchise because of the programmer's repeated violations of the closed captioning requirements.

The interests of efficient enforcement of the captioning rules mandate that the Commission put responsibility for captioning compliance where it belongs and where Congress intended — on the producers or owners of programming. The enforcement mechanism described in the *Notice* — allowing private parties to file complaints with the Commission against television stations or MVPDs^{19/} — would have anomalous results, particularly when a widely-distributed program service violates the captioning rules. By placing captioning responsibility on the distribution outlet and not on the producer of the programming, the Commission could be inundated with a torrent of complaints against MVPDs, even though only one party — the program producer — is truly at fault. At a time when the Commission is trying to marshal its limited resources, the inefficiency of such a system argues forcefully for placing ultimate responsibility for captioning violations on a single party — the program producer.

^{19/} See *Notice*, ¶¶ 122-124.

As an entity involved in the *production* as well as the distribution of video programming, Cox's conclusion that program producers should be held responsible for captioning does not represent an attempt by Cox to shirk its captioning obligations. Instead, Cox's position stems from Cox's recognition that the burdens of captioning should be placed on the parties able to shoulder those burdens most efficiently. Cox recognizes that accountability to the Commission and to hearing-impaired viewers should rest with program producers and not the thousands of distribution outlets they use.

CONCLUSION

For the foregoing reasons, the Commission should place the responsibility for compliance with its captioning rules on program creators rather than on cable operators and broadcast stations.

Respectfully submitted,

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